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In The

Supreme Court of the United States

October Term, 1974

No. 74-8

J. B. O'CONNOR, M.D. and JOHN GUMANIS, M.D.,

Petitioners,

vs.

KENNETH DONALDSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF *AMICUS CURIAE* ON BEHALF OF THE COMMITTEE ON MENTAL HYGIENE OF THE NEW YORK STATE BAR ASSOCIATION

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BRIEF *AMICUS CURIAE* ON BEHALF OF THE COMMITTEE ON MENTAL HYGIENE OF THE NEW YORK STATE BAR ASSOCIATION

This brief *amicus curiae* addresses itself to the merits of the question presented. The Committee on Mental Hygiene of the New York State Bar Association files this brief pursuant to Rule 42 of the United States Supreme Court. Both petitioners and respondent have consented to the filing of this brief and copies of the consents of petitioners and respondent have been filed with the Clerk of this Court.

INTERESTS OF THE *AMICUS CURIAE*

The New York State Bar Association (the "Association") is a voluntary association incorporated by an act of the legislature of May 2, 1877 and has a present membership of 23,904 members.

It has sixty-five Standing Committees concerned with many areas of the law. Among them is a Committee on Mental Hygiene (the "Committee") whose charge it is that it:

> "shall study all social remedial legislation having to do with mental hygiene and recommend through the proper committees of the Association changes or additions in mental hygiene law when the same would be necessary, and in general consider any and all matters pertaining to mental hygiene and aftercare of mental hygiene patients, so far as this may be affected by the law or legislation."

The Committee has examined the issue presented on this Writ of Certiorari[1] and has requested and approved the preparation of this brief *amicus curiae*. The Association's Executive Committee has approved this brief on behalf of the Association.

The Committee is concerned about the constitutional right of institutionalized mentally disabled persons to treatment, the

1. *O'Connor v. Donaldson*, 43 U.S.L.W. 3239 (October 22, 1974), granting certiorari on *Donaldson v. O'Connor*, 493 F.2d 507 (1974).

issue which is before the court herein, because of a conflict between the state and federal courts within New York which have ruled on this issue.

The New York Court of Appeals has recently recognized a constitutional right to treatment, *Kesselbrenner v. Anonymous*, 33 N.Y. 2d 161, 350 N.Y.S. 2d 889 (1973), whereas the federal court decisions on this issue are in conflict. In *New York State Association for Retarded Children v. Rockefeller*, 357 F. Supp. 759 (E.D.N.Y. 1973) the court rejected the proposition that the right to treatment is guaranteed under the Constitution. Other courts in this Circuit have indicated that in this area and in similar areas a constitutional right to treatment would be recognized. *Schuster v. Herold*, 410 F.2d 1071 (2d Cir.), *cert. denied*, 396 U.S. 847 (1969); *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972). In view of this conflict the Association wishes to be heard in this matter and welcomes a resolution of this issue.

This case presents the first direct opportunity for the Court to decide whether an involuntarily institutionalized patient has a constitutional right to treatment. The fundamental importance of this issue requires as full a briefing as is possible. The Committee, therefore, offers its analysis to assist the Court in reaching its decision.

SUMMARY OF ARGUMENT

Mentally ill persons who are civilly confined have a constitutional right to receive treatment for their mental illness.[2] This right is grounded in the due process clause of the Fourteenth Amendment and has been recognized by this Court, by several courts of lesser jurisdiction, and by legal scholars and commentators.

ARGUMENT

INVOLUNTARY CIVIL PATIENTS HAVE A CONSTITUTIONAL RIGHT TO TREATMENT GROUNDED IN THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT. SUCH RIGHT INCLUDES THE RIGHT NOT TO BE DEPRIVED OF LIBERTY WITHOUT DUE PROCESS OF LAW AND THE PROSCRIPTION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

It is the right of every person to be free of unnecessary governmental restraints. Such right may only be infringed to serve a legitimate governmental purpose conditioned, however, by the safeguards complying with the wide range of protections comprehended under the rubric of "due process of law." *Shelton v. Tucker*, 364 U.S. 479 (1960); *Sherbert v. Verner*, 374 U.S. 398

2. The Committee restricts its present analysis to the right of mentally ill persons to treatment when they are involuntarily confined, the issue on appeal herein. At the present time the Committee is taking no position with respect to the right to treatment of persons institutionalized for other mental disabilities which may involve additional considerations not treated herein.

(1962); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Shapiro v. Thompson*, 394 U.S. 618 (1968); *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676 (D. Mass. 1973), *aff'd.*, 497 F.2d 1196 (1st Cir. 1974); *Kesselbrenner v. Anonymous*, 33 N.Y. 2d 161, 350 N.Y.S. 2d 889 (1973).

Generally, deprivations of liberty are permitted for periods of limited duration if the government can establish that a crime has been committed. In such cases, accused defendants are afforded a high degree of procedural and substantive protection.

In certain other instances, persons who are not involved in the criminal justice system may also be deprived of their liberty. The mentally ill have been included as part of this group. *Fhagen v. Miller*, 29 N.Y. 2d 348, *cert. denied*, 409 U.S. 845 (1972) What constitutes due process of law for those deprived of liberty because of mental illness, and, indeed, for all the institutionalized mentally disabled, is of central importance to the scheme of mental health laws throughout the nation and to the fundamental right to liberty of all.

It is the position of the Committee that denial of liberty to a mentally ill person who is not involved in the criminal justice system can satisfy constitutional due process requirements only if such denial is based on a corresponding obligation to provide treatment and treatment is actually provided.[3]

It is manifest that, under the broadened concept of "liberty" embraced by this Court in its decisions culminating in *Roe v.*

3. The hospital should be obligated to make a good-faith showing that it has exhausted known types of treatment suitable to the illness in question and that no further therapy is available.

Wade, 410 U.S. 113 (1973). Respondent in this action clearly has a right to treatment cognizable under the Fourteenth Amendment.

As stated by Justice Stewart, in his concurring opinion, *supra*, 410 U.S. at 167 *et seq.*, the right to treatment falls within the ambit of those cases decided under the doctrine of substantive due process. [*Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972)]:

> "'In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed.' *Board of Regents v. Roth*, 408 U.S. 564, 572. The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights." 410 U.S. at 168.

This Court first gave expression to the constitutional requirement of providing treatment to persons deprived of liberty due to their mental illness in *Robinson v. California*, 370 U.S. 660 (1962). Although dealing with a California statute which provided for imposition of criminal penalties for the mere status, without more, of addiction to narcotics, this Court made a basic assumption that persons who are mentally ill could not be punished for their illness:

> "It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill . . . in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." 370 U.S. at 666.

This Court further outlined the permissible course a state or state officials might follow with regard to mentally ill persons:

> "A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment . . . ." 370 U.S. at 666.

Thus involuntary civil commitment may be tolerated, but only if accompanied by treatment. This principle was grounded in fundamental due process, more specifically, the Eighth Amendment proscription against cruel and unusual punishment made applicable to the states by the due process clause of the Fourteenth Amendment.

In Justice Douglas' opinion, concurring, he stated:

> "If addicts can be punished for their addiction, then the insane can also be punished for their insanity. Each has a disease and each must be treated as a sick person." 370 U.S. at 674.

In *Baxstrom v. Herold*, 383 U.S. 107 (1966), this Court had occasion to analyze procedures in New York whereby patients in Dannemora State Hospital, a correctional mental institution, who were nearing the end of a prison sentence, could be civilly retained without the procedural safeguards available to persons otherwise civilly committed. An equally important issue was in which institution the patient could be placed. This Court found that equal protection of the laws required that such mentally ill person receive the same procedural safeguards in a civil commitment proceeding available to all others.

With regard to the place of hospitalization, this Court took occasion to note "striking dissimilarities" between civil institutions operated by the Department of Mental Hygiene and Dannemora. One of the most critical dissimilarities was that Department of Correction facilities were used for the purpose of confining and caring for mentally ill persons whereas Mental Hygiene facilities were to provide care and *treatment* for mental illness. Compare former New York Correction Law §375 with former New York Mental Hygiene Law §2.

This Court subsequently analyzed the nature of civil commitment and treatment in *Powell v. Texas*, 392 U.S. 514 (1968). That case involved whether a state might constitutionally impose a criminal penalty for public intoxication. Although argument was made that alcoholism was a disease akin to drug addiction requiring treatment not punishment, as in *Robinson v. California, supra*, a divided Court rejected this contention.

Underlying the majority opinion was a concern that there was no evidence that treatment would be available to alcoholics

were they to be civilly committed. This Court reasoned that in the absence of any assured course of treatment, the more humane approach would be a short prison term which at least would give alcoholics an opportunity to become sober before being returned to the streets.

The premise of the decision was that if civil commitment were to be used for alcoholics, treatment reasonably expected to lead to freedom from "hospitalization" would have to be provided. Such treatment would have to be more than merely custodial or punitive; it would have to be reasonably effective toward assuring a prospect of eventual freedom. Since this Court found no such treatment available for alcoholics, it refused to order their civil commitment.

The New York Court of Appeals recognized the imperative of *Robinson, supra*, when, in passing upon the New York Narcotic Control Act of 1966, it declared in *People v. Fuller*, 24 N.Y. 2d 292, 300 N.Y.S. 2d 102 (1969):

> "By its terms New York's Narcotic Control Act of 1966 recognizes that drug addiction is a 'disease' and that an addict is a sick person in need of treatment . . . . The basic premise of the narcotic control program is and constitutionally must be a rehabilitative one." 24 N.Y. 2d at 301.

The Court further stated, 24 N.Y. 2d at 302-303:

> "All jails in some measure seek to have a program of rehabilitation, but in upholding, by

> way of dictum, a compulsory civil commitment program for narcotics rehabilitation, in *Robinson v. California* . . . the Supreme Court was referring to a full and complete program of treatment. Compulsory commitment must indeed be something 'beyond the hanging of a new sign — reading "hospital" — over one wing at the jailhouse' *(Powell v. Texas,* 392 U.S. 514, 529).
>
> * * *
>
> The moment that the program begins to serve the traditional purposes of criminal punishment, such as deterrence, preventive detention, or retribution, then the extended denial of liberty is simply no different than a prison sentence. . . ."

In *Humphrey v. Cady,* 405 U.S. 504 (1972) petitioner challenged the place and character of confinement in a correctional Sex Deviate Facility. He contended that commitment for what might "also amount to 'mental illness'" (at 512) to a state prison rather than a mental hospital, and the consequent denial of treatment for this condition,violated equal protection and due process. This Court found that he had raised "substantial constitutional claims".

Recently, in *Jackson v. Indiana,* 406 U.S. 715 (1972), this Court considered the commitment procedures in Indiana whereby an indicted person who was incompetent to stand trial was institutionalized. This Court again emphasized that civilly committed patients are entitled to treatment:

> ". . . we cannot say by virtue of his incompetency commitment Jackson has been denied an assignment [to an appropriate institution] or appropriate treatment to which those not charged with crimes would generally be entitled." 406 U.S. at 731 fn. 9.

This Court found that after a reasonable period of time had elapsed necessary to determine whether a substantial probability existed that the patient would attain capacity to stand trial in the foreseeable future, or would make progress toward recovery, the patient would have to be civilly committed or released. Even if it appeared that he would soon be able to stand trial, commitment could only be justified by progress towards that goal.

Further, this Court capsulized the essence of commitment for mental illness:

> "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." 406 U.S. at 738.

Since in civil commitment of the mentally ill, the purpose is treatment for mental illness, absent treatment, the nature of commitment would not be reasonably related to its purpose. Therefore, due process of law requires that treatment accompany institutionalization for mental illness.

Although this Court has not had frequent occasion to rule on the constitutional requirements of civil commitment,[4] as shown in the cases discussed above, this Court has repeatedly indicated that due process requires treatment as an essential requisite for civil involuntary hospitalization for mental illness.

With increasing frequency, courts across the country have begun to recognize a constitutional right to treatment for civilly institutionalized persons confined because of mental disability[5] or because of a status for which the person is confined.[6]

This trend is the result of more enlightened thinking on the issue, the opinions of this Court, and the considered examination of the issue by legal scholars and commentators.[7]

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4. See *Jackson v. Indiana*, 406 U.S. at 737.

5. *Wyatt v. Stickney*, 325 F.Supp. 781 (M.D. Ala. 1971), *hearing ordered*, 334 F. Supp. 1341 (M.D. Ala. 1971), *enforced*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd sub nom; Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974), appears to be the most significant of these decisions. A constitutional right to treatment for involuntary civil patients has also been found in *Kesselbrenner v. Anonymous*, 33 N.Y.2d 161, 350 N.Y.S.2d 889 (1973); *Nason v. Superintendent*, 233 N.E.2d 908 (Mass. 1968); *Welsch v. Likens*, 373 F.Supp. 487 (D. Minn. 1974); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966).

6. *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972) *enforced*, 359 F. Supp. 478 (S.D.N.Y. 1973); *Inmates of Boys Training School v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972); *People v. Fuller*, 24 N.Y.2d 292, 300 N.Y.S.2d 102 (1969); *Stachulak v. Coughlin*, 364 F. Supp. 686 (N.D. Ill. 1973); *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974), *cert. denied*, 417 U.S. 976 (1974); *Morales v. Turman*, 364 F. Supp. 166 (E.D. Tex. 1973), 383 F. Supp. 53 (1974).

7. Note, *Developments in the Law — Civil Commitment of the Mentally Ill*, 87 Harvard Law Rev. 1190, 1316 (1974); Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499 (1960); Symposium, *The Right to Treatment*, 57 Georgetown 673 (1969); Symposium, *The Mentally Ill and the Right to Treatment*, 36 Univ. Chi. Law Rev. 742 *et*

(Cont'd)

In the instant case, respondent has established to the satisfaction of the trier of fact that he had been deprived of treatment during his 14 years of incarceration at Florida State Hospital. He has, therefore, been deprived of his liberty and denied due process of law to which all persons are entitled under the Fourteenth Amendment.

(Cont'd)

seq. (1969); Note, *Due Process for All — Constitutional Standards for Involuntary Civil Commitment and Release*, 34 Univ. Chi. Law Rev. 633 (1967); Note, *The Nascent Right to Treatment*, 53 Univ. Va. Law Rev. 1134 (1967); Note, *Civil Restraint, Mental Illness, and the Right to Treatment*, 77 Yale L.J. 87 (1967).

CONCLUSION

For the foregoing reasons, the Committee submits that the decision below should be affirmed.

Respectfully submitted,

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Members of the Sub-Committee on the Brief for the Amicus Curiae Committee on Mental Hygiene of the New York State Bar Association